



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF I-O-A-

DATE: JAN. 25, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a physician, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). Section 203(b)(2)(B)(ii) of the Act provides that such a waiver shall be afforded to a physician who meets several conditions, including that the individual will work in an area with a shortage of health care professionals.

The Director of the Nebraska Service Center denied the Form I-140, Immigrant Petition for Alien Worker, and a subsequent motion, finding that the Petitioner had not established that he had either fulfilled the foreign residence requirements of his J-1 nonimmigrant educational exchange visitor visa or received of waiver of those requirements.

On appeal, the Petitioner submits additional evidence and contends that he is eligible for a physician national interest waiver.

Upon *de novo* review, we will sustain the appeal.

I. LAW

Section 203(b) of the Act states, in pertinent part:

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

(A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. Subject to clause (ii), the Attorney General¹ may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

(ii) Physicians working in shortage areas or veteran facilities.

(I) In general. The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if –

(aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

As indicated above, section 203(b)(2)(B)(ii)(I) of the Act provides a national interest waiver for certain physicians who agree to work in an area designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs. In addition, section 203(b)(2)(B)(ii)(I) states that the physician must complete five years of service in such a setting, “not including the time served in the status of an alien described in section 101(a)(15)(J) [J-1 status],” before he or she may be issued a “permanent resident visa” or adjust status.

The implementing regulations at 8 C.F.R. § 204.12 indicate that a physician must agree to work full time for an aggregate of five years, and they set forth the evidentiary requirements to establish eligibility for the national interest waiver. Specifically, as relevant here, the regulation at 8 C.F.R. § 204.12(c) provides that a petitioner must submit certain documentation in support of the petition, including “[e]vidence of the Service-issued waivers, if applicable, of the requirements of sections

¹ Pursuant to section 1517 of the Homeland Security Act of 2002 (“HSA”), Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA “shall be deemed to refer to the Secretary” of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

212(e) of the Act, if the alien physician has been a J-1 nonimmigrant receiving medical training within the United States.” 8 C.F.R. § 204.12(c)(5).²

II. ANALYSIS

The Petitioner received his Doctor of Medicine degree from [REDACTED] in May 2013. Accordingly, he qualifies as a member of the professions holding an advanced degree. The remaining issue is whether he has demonstrated eligibility for a national interest waiver based on practicing medicine in an area with a shortage of health care professionals.

The record includes the Petitioner’s February 2016 full-time employment contract with [REDACTED] to work at [REDACTED] in [REDACTED] Maryland; a February 2016 letter from the [REDACTED] attesting that his work is in the public interest; and information from the U.S. Department of Health and Human Services indicating that his medical service is in a primary care health professional shortage area. In addition, the Petitioner provided his medical degree; U.S. Medical Licensing Examination Score report for steps 1, 2, and 3; State of Maryland medical license; and training certification from [REDACTED]. Accordingly, the record demonstrates that the Petitioner meets the regulatory requirements identified at 8 C.F.R. § 204.12(c)(1)-(4).

With respect to meeting the requirement at 8 C.F.R. § 204.12(c)(5), the Director stated in both decisions that the Petitioner had not established that he had either fulfilled the foreign residence requirements of his J-1 nonimmigrant visa or received a waiver of those requirements. In the appeal brief, the Petitioner indicates that USCIS granted him a waiver pursuant to section 212(e) of the Act.³ The record includes documentation from USCIS showing that he was granted a waiver of the two-year foreign residence requirement. As USCIS granted the Petitioner a waiver of the requirements of section 212(e) of the Act, we find that he has satisfied the requirements of the regulation at 8 C.F.R. § 204.12(c)(5) and overcome the Director’s basis for denial.

² Section 212(e) of the Act provides that an individual who has held J-1 status in order to receive graduate medical education or training shall not be eligible to apply for an immigrant visa, permanent residence, or listed nonimmigrant visas until he or she has resided and been physically present in the country of his or her nationality or last residence for at least two years. It further states that this foreign residency requirement may be waived under certain circumstances, including at the request of a State Department of Public Health, subject to the restrictions on waivers set forth at section 214(l) of the Act.

³ The Petitioner also maintains that he “ceased being in J-1 status on July 1, 2016” when he commenced employment at [REDACTED] and that he has worked there since that date. The issue of when the Petitioner’s J-1 nonimmigrant status ended for the purpose of counting his five years of service is relevant to the adjustment of status application and should be considered in those proceedings. See 8 C.F.R. § 245.18(e); see also Memorandum from Michael Aytes, Associate Director, Domestic Operations, USCIS, HQ 70/6.2, *Interim guidance for adjudicating national interest waiver (NIW) petitions and related adjustment applications for physicians serving in medically underserved areas in light of Schneider v. Chertoff*, 450 F.3d 944 (9th Cir. 2006) (“*Schneider decision*”) (Jan. 23, 2007), <https://www.uscis.gov/legal-resources/policy-memoranda>.

III. CONCLUSION

For the reasons discussed above, we find that the Petitioner has established he is eligible for a national interest waiver.

ORDER: The appeal is sustained.

Cite as *Matter of I-O-A-*, ID# 1669445 (AAO Jan. 25, 2019)